

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DATATREASURY CORPORATION,	§	
<i>Plaintiff</i>	§	No. 2:03-cv-00459-DF
	§	
	§	Hon. David Folsom
v.	§	Hon. Caroline Craven
	§	
MAGTEK, INC., f/k/a/ MAG-TEK, INC.,	§	Jury
<i>Defendant.</i>	§	

DATATREASURY CORPORATION'S MOTION TO EXCLUDE WITNESSES
TENDERED AS EXPERTS BY MAGTEK, INC. PURSUANT TO FED. R. EVID. 702
AND FOR A HEARING ON ADMISSIBILITY PURSUANT TO FED. R. EVID. 104

COMES NOW Plaintiff herein, DataTreasury Corporation ("DataTreasury"), and files this Motion to Exclude Witnesses Tendered by Magtek, Inc. ("Magtek") Pursuant to Fed. R. Evid. 702 and for a Hearing on Admissibility Pursuant to Fed. R. Evid. 104. In support wherefore, DataTreasury shows as follows:

(1) Fed. R. Evid. 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

(2) The United States Supreme Court closely examined the question of the trial court's "gatekeeping function" in the area of expert witnesses in *Daubert v. MerrellDow Pharms., Inc.*, 509 U.S. 579 (1993). The Court held that "[f]aced with a proffer of expert scientific testimony ... the trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This

entails a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue..” *Id.* at 592.

(3) In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), the Court made clear that the same “gatekeeping” function, and the same approach, applies to proposed expert testimony based on “technical” or “other specialized” knowledge.

(4) The witnesses proffered by Magtek fail these tests, and must be precluded from testifying at trial. Because the parties have repeatedly agreed to adjust the scheduling order in this case, the depositions of these witnesses have not yet been taken, but will shortly. The full measure of these witnesses’ susceptibility to being stricken under Fed. R. Evid. 702 accordingly remains to be seen, but will be known soon. DataTreasury reserves the right to supplement the instant challenge to testimony by these proposed witnesses upon completion of their depositions.

WHEREFORE, DataTreasury respectfully requests that the Court schedule an evidentiary hearing pursuant to Fed. R. Evid. 104 as to the admissibility of the testimony of those witnesses designated as experts by Magtek, or address this matter during the pretrial conference of this cause, and that following such hearing, the Court enter an Order precluding the proposed testimony of these witnesses.

Respectfully submitted,

BY: //ss// Karl A. Rupp _____

EDWARD L. HOHN

Texas State Bar Number: 09813240

edhohn@nixlawfirm.com

D. NEIL SMITH

Texas State Bar Number: 00797450

dnsmith@nixlawfirm.com

NIX, PATTERSON & ROACH, LLP

205 Linda Drive

Daingerfield, Texas 75638

Telephone: 903.645.7333

Facsimile: 903.645.4415

C. CARY PATTERSON

Texas Bar No. 15587000

ANTHONY K. BRUSTER

Texas State Bar Number: 24036280

akbruster@nixlawfirm.com

BRADY PADDOCK

Texas State Bar Number: 00791394

bpaddock@nixlawfirm.com

R. BENJAMIN KING

Texas Bar No. 24048592

benking@nixlawfirm.com

NIX, PATTERON & ROACH, LLP

2600 St. Michael Drive, Suite 500

Texarkana, Texas 75503

Telephone: 903.223.3999

Facsimile: 903.223.8520

JOE KENDALL

Texas Bar No. 11260700

jkendall@provostumphrey.com

KARL RUPP

Texas Bar No. 24035243

krupp@provostumphrey.com

PROVOST UMPHREY, LLP

3232 McKinney Avenue, Suite 700

Dallas, Texas 75204

Telephone: 214.774.3000

Facsimile: 214.744.3015

ROD COOPER

rcooper@cooperiplaw.com

THE COOPER LAW FIRM

5215 N. O'Connor Blvd.

Suite 1900

Irving, Texas 75039

Telephone: 972.831.1188

Facsimile: 972.692.5445

ERIC M. ALBRITTON

Texas Bar No. 00790215

ema@emafirm.com

ALBRITTON LAW FIRM

P.O. Box 2649

Longview, Texas 75606

Telephone: 903.757.8449

Facsimile: 903.758.7397

T. JOHN WARD, JR.

Texas Bar No. 00794818

jw@jwfirm.com

**LAW OFFICES OF T. JOHN WARD, JR.
PC**

P.O. Box 1231

Longview, Texas 75606

Telephone: 903.757.6400

Facsimile: 903.757.2323

**ATTORNEYS FOR PLAINTIFF
DATATREASURY CORPORATION**